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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APR 3 1997

Federal Communications Commission
Office of Secretary

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In the Matter of)
)
Request of U S West Communications, Inc.) CC Docket No. 97-90
for Interconnection Cost Adjustment) CCB/CPD 97-12
Mechanisms)
)

JOINT COMMENTS OF BELL ATLANTIC¹ AND NYNEX²

The Commission should reject this latest attempt by competitive local exchange carriers ("CLECs") to force incumbent LECs to eat the start-up costs that they must by law incur to provide interconnection, resale and unbundled network elements. Under the Act, such cost recovery and pricing issues are expressly assigned to the States. Furthermore, the Act is clear that these costs, often referred to as cost onsets, are recoverable either as offsets to resale discounts or as part of the price of network elements.

I. THE STATES HAVE EXCLUSIVE AUTHORITY OVER PRICING OF INTERCONNECTION, RESALE AND NETWORK UNBUNDLED ELEMENTS.

The Act deprives the Commission of authority to regulate the pricing of interconnection, resale and unbundled network elements. Indeed, under the Act, cost recovery issues are to be addressed in the first instance by the States, not the

¹ The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; and Bell Atlantic-West Virginia, Inc.

² The NYNEX Telephone Companies ("NYNEX") are New England Telephone and Telegraph Company and New York Telephone Company.

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Commission. When the Commission previously attempted to adopt national pricing and cost recovery rules, those rules were stayed by the Eighth Circuit. NYNEX/Bell Atlantic will not repeat here the arguments made both at the Commission and the Eighth Circuit that demonstrate that the Commission does not have the authority to preclude states from adopting pricing and cost recovery rules. As the Court of Appeals indicated in the Stay Order, "the petitioners have demonstrated that they will likely succeed on the merits of their appeals based on their argument that, under the Act, the FCC is without jurisdiction to establish pricing regulations regarding intrastate telephone service."³

The Act gives the Commission jurisdiction over rates for interconnection, resale and unbundled elements only when an individual state fails to exercise its jurisdiction.⁴ Moreover, where a state does act, review may be obtained solely by a Federal District Court, not at the Commission.⁵ Thus, petitioners' exclusive lawful remedy is to seek review of the individual orders in Federal District Court. The Commission does not have a statutory role in this review process and cannot create one here.

Petitioners' argument that the proposed cost recovery mechanism is prohibited by Section 253 is also without merit. Section 253(a) prohibits a state or locality from adopting a requirement that "prohibit[s] or [has] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."⁶ The Commission may preempt a state's authority, however, only if, after a case-specific

³ Iowa Utilities Board v. F.C.C., No. 96-3321, Order Granting Stay Pending Judicial Review (8th Cir., October 15, 1996).

⁴ 47 U.S.C. § 252(e)(5).

⁵ 47 U.S.C. § 252(e)(6).

⁶ 47 U.S.C. § 253(a).

review or an individual challenged regulation, it determines based on a factual record that a particular regulation has actually prohibited, or is having the effect of prohibiting, competitive entry.⁷ Petitioners have made no such showing here. There is nothing in the record to support their claim that the proposed cost recovery mechanism will have the effect of prohibiting local entry or making profitable entry impossible.

II. COST ONSETS ARE RECOVERABLE UNDER THE ACT.

There is no question that the Act allows incumbent LECs to recover their costs of providing interconnection, resale and unbundled network elements. Section 252(d)(1) of the Act provides that incumbent LECs have the right to recover their costs (plus a reasonable profit) of providing interconnection and unbundled network elements. Under Section 252(d)(3), incumbent LECs have the right to price resale services based on retail rates less only the costs that will be avoided.

Bell Atlantic/NYNEX and other incumbent LECs will incur many new categories of costs in serving the reseller and unbundled network element markets. Bell Atlantic/NYNEX will incur some of these costs in order to achieve the "cost offsets" reflected in their resale avoidable cost analyses, *i.e.*, in order to implement and maintain new interfaces that will enable them to offer bulk billing, provisioning, and trouble testing to resellers. If these costs were not incurred, the amount of costs avoided would be significantly reduced. Other cost onsets simply represent the costs of providing particular services to resellers.

⁷ See 47 U.S.C. § 253(d).

Conceptually, these costs could be taken into account in resale pricing either by incorporating them into the basic wholesale pricing formula (*i.e.*, by calculating the wholesale price as retail price less *net* avoided cost), or else by imposing them as separate rate elements to be paid by resellers. These are rate structure considerations which, although important issues to be addressed by State commissions, do not affect an incumbent LEC's basic right to recover its cost onsets in some form or another.

In the *Local Competition Order*, the Commission specifically recognized that LECs are entitled to recover cost onsets.⁸ For example, the Commission stated that the presumption that the costs recorded in certain accounts are avoidable could be rebutted if "an incumbent LEC proves to the state commission that specific costs in these accounts will be incurred with respect to services sold at wholesale."⁹ Cost onsets are simply new costs that are in fact "incurred with respect to services sold at wholesale." Moreover, in analyzing an MCI model that was adapted by the Commission for use in computing "default" resale discounts, the Commission made it clear that such new costs should be recoverable.¹⁰

⁸ Furthermore, as U S WEST notes in its Comments, failure to allow incumbent LECs to recover these costs would result in an unconstitutional taking of property. See Duquesne Light Co. v. Barasch, 488 U.S. 299, 308-10 (1989) ("If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments"); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Bell Atlantic Telephone Companies v. F.C.C., 24 F.3d 1441, 1445 (D.C. Cir. 1994).

⁹ Local Competition Order ¶ 917.

¹⁰ Id. at ¶ 928.

III. CONCLUSION

The Commission should deny the declaratory ruling requested by Petitioners.

Respectfully submitted,

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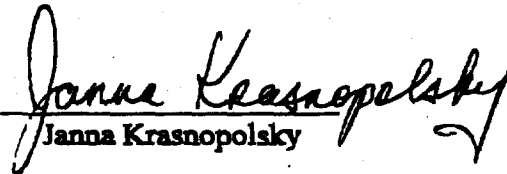
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April 3, 1997

CERTIFICATE OF SERVICE

I, Janna Krasnopolsky, hereby certify that a copy of the foregoing **JOINT
COMMENTS OF BELL ATLANTIC AND NYNEX** was served on each of the
parties listed on the attached Service List, this 3rd day of April, 1977, by first class
U.S. mail, postage prepaid.


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